No. (1) 001758 MAY 21 2001

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In The
Supreme Court of the United States

GRETHA M. HURST,

Petitioner,

V.

HOME DEPOT, U.S.A., INCORPORATED,
a/k/a Home Depot,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR BY MISINTERPRETING AND MISAPPLYING THE CASE LAW OF THE STATE OF SOUTH CAROLINA AND AFFIRMING THE DISTRICT COURT'S GRANT OF THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

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OPINIONS BELOW.

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit in *Gretha M. Hurst v. Home Depot, et. al.*, No. 00-1899 (U.S. App. 4th Cir. 1/8/01); CA-99-1334-2-11 (D.S.C. June 20, 2000) was entered on January 8, 2001, and is set forth in the Appendix hereto (App. 1a).

The Memorandum of Decision of the District Court for the District of South Carolina in *Gretha M. Hurst v. Home Depot, et. al.*, is unreported and set forth in the Appendix hereto (App. 3a).

BASIS FOR JURISDICTION.

The final judgment of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court District of South Carolina Charleston Division was entered on January 8, 2001. This petition for writ of certiorari is filed within ninety day for the date the Petitioners petition for rehearing and motion for enlargement of time was denied by the Court of Appeals on February 21, 2001 (App. 11a). 28 U.S.C. Section 2101.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1332.

CONSTITUTIONAL PROVISIONS INVOLVED.

United States Constitution, Amendment VII

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

STATEMENT OF CASE.

This case arises out of an accident that occurred on Sunday, March 10, 1996 while the Petitioner, Gretha M. Hurst, was shopping at the Home Depot store located in North Charleston, South Carolina. While the Petitioner was shopping, a roll of linoleum fell and struck her on the back of her head, her hand was scrapped and bleeding. The accident happened several aisles away from where the linoleum is displayed in the store. William Tezza, (Gretha's fiancée) heard the accident happen "it sounded like a large slap.... The linoleum slapping on concrete". Mike Pangburn, an employee of Home Depot, testified that on Sunday, March 10, 1996 he was doing inventory, because, Home Depot conducts inventory on Sunday. Pangburn testified that he saw Gretha immediately after the accident and that he heard the roll of linoleum fall and hit her.

> **" I think I heard actually the vinyl maybe falling, but I did hear the impact of the vinyl, and then the vinyl hitting the floor. And I, you know, I heard someone get their wind knocked out, is what I can best describe it as. It was like an umph, you know. Of course, she's got a female voice, so I could tell that, you know, it was a female that got hurt. And it was just, you know—I believe I heard a sliding too. I believe I heard the vinyl sliding off where I believe it was leaned against.**

Mike Pangburn also substantiated the fact that the object that injured Gretha was a dangerous object. He testified that the roll of linoleum was 12 feet long and may have weighed as much as 100 pounds. Mike Pangburn, further testified that Home Depot is aware customer lean objects against the racks while shopping. He stated that "I

would have taken it down.... Well, I see things like that all the time, and I correct it if I can. Home Depot has no signs instructing customers on the proper way to carry heavy objects or items. Home Depot has no safety video or manual that educates its employees on how to assist or instruct customers on how to safely handle items within the store.

Apparently, the linoleum had been leaned against a rack by two customers because William Tezza, who was in the store but in a separate area from the Petitioner, testified in his deposition that two customers came to the scene after the accident, apologized, picked up the linoleum and left.. William Tezza did, in fact, testify that he walked past the area from which the vinyl fell fifteen to twenty minutes before the accident and that he did not see it, not *that it was not there at that time*. William Tezza testified that Mike Pangburn and a District Manger (name unknown) were both doing inventory on the same aisle that Gretha was injured on.

Mike Pangburn testified, that it is a practice of Home Depot to allow customers to carry their own linoleum without the use of carts and that an employee does the "rolling off of the vinyl". William Tezza testified that an employee of Home Depot told him that said employee had cut a piece of linoleum for a customer, and that only an employee could cut linoleum for a customer. And, that there are on warning or instruction signs for customers regarding the loading or carrying of items in Home Depot.

Litigation of this case began on March 2, 1999 when the Petitioner, a citizen of South Carolina filed a Summons and Complaint in the South Carolina Court of Common Pleas for Charleston County requesting more than the sum of Seventy-five Thousand ($75,000.00) Dollars in damages, against the above Respondent, a Delaware corporation with its principle place of business in the state of Georgia alleging that the Home Depot USA, Inc. a/k/a Home Depot

(Home Depot) was negligent in causing an accident that resulted in injuries to the Petitioner. Home Depot removed the case to the United States District Court of South Carolina (Charleston) pursuant to Diversity Jurisdiction as delineated in 28 U.S.C. Section 1332, on May 4, 1999 and filed an Answer containing a general denial and several affirmative defenses. Following closure of all discovery the Respondent filed a Motion for Summary Judgment. After review of briefs and oral arguments of the parties the Honorable Falcon B. Hawkins granted the Respondent's motion for Summary Judgment by Order dated June 20, 2000, effectively dismissing the Petitioner's case. The basic reason given for granting summary judgment was that the Respondent did not place the linoleum against the rack and had no notice, constructive or otherwise, of the presence of said linoleum. (App. 3a) Petitioner promptly filed a Notice of Intent to Appeal on July 5, 2000 and appealed the decision of the District Court granting summary judgment.

On December 8, 2000 the appeal of this case was submitted to United States Court of Appeals for the Fourth Circuit. On January 8, 2001 the United States Court of Appeals for the Fourth Circuit issued its decisions affirming the District Judge in all respects (App. 1a). No reasoning was presented in the unpublished opinion.

The Petitioner filed a Motion for Enlargement of Time in order to file a Petition for Rehearing, and in order to preserve her rights the Petitioner also filed a Petition for Rehearing further pursue her appeal. Both were denied by order of the United States Court of Appeals for the Fourth Circuit on February 21, 2001. No reasoning was presented in said Order (App. 11a).

REASONS FOR GRANTING THE WRIT.

I. THE COURT OF APPEALS HAS MISINTERPRETED THE CASE LAW OF THE STATE OF SOUTH CAROLINA AND HAS ERRED IN AFFIRMING THE DISTRICT COURT'S GRANT OF THE RESPONDENT'S MOTION FOR SUMMARY JUDGEMENT.

Respondent created the hazardous condition which caused injury to the Petitioner. Since the hazardous condition was created by Respondent the Respondent had actual or constructive notice that the existence of said hazard. Respondent was negligent, by allowing a dangerous item to be haphazardly carried about its premises, without instruction and/or supervision on how to properly handle said items. This practice permitted the item to be positioned in such a manner as to cause injury to its customer, the Petitioner. Also, Respondent was negligent in failing to warn its customers (i.e., the Petitioner) that hazardous conditions exist on the premises when the conditions are known by Respondent. This failure to warn lulls its customers into feeling safe when in fact its customers should be alerted to be vigilant.

Although, this is not a traditional "slip-and-fall" case and the traditional "slip and fall" analysis should not exclusively apply, South Carolina law states that, "One who operates mercantile establishment is not insurer of his customers' safety, but must keep aisles and passageways in reasonably safe condition." *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001). Duty owed to customers by merchant includes duty to keep aisles and passageways in reasonably safe condition. *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001).

Whether a Respondent provided reasonably safe premises to an invitee is a jury question. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984).

To recover in a premises liability action against a store, customer had to show either: (1) the proprietor or the proprietor's employees created the condition, or (2) the proprietor had notice of it. *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 541 S.E.2d 831 (2001). The duty owed to an invitee is an active or affirmative duty; it includes refraining from any act which may make the invitee's use of the premises dangerous or result in injury to him. *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 541 S.E.2d 831 (2001). In the case at hand, the length and weight of the linoleum coupled with the lack of supervision, assistance and/or instruction by Home Depot creates a genuine issue of material fact as to whether Home Depot was negligent. Home Depot, as a standard practice, permitted this heavy awkward roll of linoleum to be dangerously handled and transported through its store without instruction, supervision or assistance, which created the hazard in the first place.

Mike Pangburn testified that Home Depot permits its customers to carry out large, awkward, heavy items without carrying or safety instruction, that Home Depot does not instruct its employee's on how to assist said customers, that Home Depot does not have any safety instruction signs, and that customers lean things up against the racks. (Home Depot does not even have any warning signs located in the store). The size and weight of this linoleum (i.e., 12 feet long and as much as 100 pounds in weight) indicates that this object was inherently dangerous. The mere fact that a customer was not assisted, instructed or supervised on how to carry this item out the store in effect created the dangerous condition. The fact that a district manager and Mike Pangburn were doing inventory on the same aisle that Gretha was injured is evidence that Home Depot (i.e., through the simple vigilance

of an employee) knew or should have known that the linoleum was leaning against the rack. The employee who cut the linoleum and presented it to the customer provided Home Depot with knowledge or constructive knowledge that the linoleum was dangerously present on its premises. Home Depot's policy or lack thereof regarding this type of matter is evidence of negligence.

Home Depot in failing to warn its customers that other customers are permitted to carry large, heavy and potentially dangerous items around the store without instruction, supervision or assistance, and that dangerous conditions are created thereby, is evidence of negligence. According to *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001), a storekeeper liability is founded upon the duty of care a possessor of land owes to an invitee. South Carolina law acknowledges that an owner of land possesses a ***general duty to warn*** others of latent hazardous conditions on his land. This duty arises from the owner's superior knowledge of conditions on the premises within his control. *Byerly v. Connor*, 307 S.C. 441, 415 S.E.2d 796 (1992). In the case of *King v. Daniel International Corporation*, 278 S.C. 350, 296 S.E.2d 335 (1982) the court ruled that a corporation which was constructing parking facilities for Petitioner's employer was charged with duty of due care to leave premises in a safe condition, that is, free from any hazards to safety which it may have created, and where corporation was aware that employer's employees parked in unlighted parking lot constructed by corporation which contained uncovered drainage ditch, ***corporation had duty to warn*** Petitioner and employer's other employees of existence of the open pit. *King v. Daniel International Corporation,* 278 S.C. 350, 296 S.E.2d 335 (1982). Home Depot has and had an affirmative duty to warn its customers of hazardous conditions on store premises.

A jury must decide whether or not Home Depot knew or should have known that the linoleum as dangerously present on the store premises. A jury should decide whether or not Home Depot created the "dangerous condition" through it policies and actions or lack thereof. A jury must decided whether or not Home Depot in any way caused Gretha Hurst to become injured.

CONCLUSION.

For all the reasons identified herein, the writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Fourth Circuit and ultimately, to reverse and remand the same to the United States District Court for the District of South Carolina for trial. The Petitioner has a constitutional right to have a jury of her peers decide questions of fact.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1899

GRETHA M. HURST,
Plaintiff - Appellant,

versus

HOME DEPOT U.S.A., INCORPORATED,
a/k/a Home Depot,
Defendant - Appellee.

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
Falcon B. Hawkins, Senior District Judge.
(CA-99-1334-11)

Submitted: December 20, 2000
Decided: January 8, 2001
Entered: January 8, 2001

Before LUTTIG, WILLIAMS, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

G. Thomas Hill, HILL, HILL & HILL, Ravenel, South Carolina, for Appellant. James H. Elliott, Jr., BARNWELL, WHALEY, PATTERSON & HELMS, L.L.C., Charleston, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Gretha M. Hurst appeals the district court's order granting summary judgment in Appellee's favor in this personal injury action. We have reviewed the parties' briefs, the joint appendix, and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Hurst v. Home Depot U.S.A., Inc. No. CA-99-1334-2-11 (D.S.C. June 20, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument will not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

GRETHA M. HURST	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C. A. # 2: 99-1334-11**
	)	
HOME DEPOT U.S.A., INC., a/k/a HOME DEPOT	)	
	)	
	)	
Defendant.	)	

Entered: June 20, 2000

ORDER

This matter is before the court on Home Depot's Motion for Summary Judgment. For the reasons set forth below, the motion is granted and this matter is dismissed.

Factual Allegations

The facts, as alleged by plaintiff, are as follows:

This case arises out of an accident that occurred on March 10, 1996 when plaintiff was shopping at the Home Depot store in North Charleston. While shopping, a roll of linoleum that was leaned up against the shelving fell and struck plaintiff on her head, neck and hand. Plaintiff suffered physical injuries from the fall.

The accident occurred several aisles away from where the linoleum is displayed in the store. William Tezza

(plaintiff's fiancee) heard the accident happen and stated "it sounded like a large slap.... The linoleum slapping on the concrete." Mike Pangburn, an employee of Home Depot, testified that on the day of the accident he was doing inventory and he heard the linoleum fall and hit plaintiff:

> I think I heard actually the vinyl maybe falling, but I did hear the impact of the vinyl, and then the vinyl hitting the floor. And I, you know, I heard someone get their wind knocked out, is what I can best describe it as. It was like an umph, you know. Of course, she's got a female voice, so I could tell that, you know, it was a female that got hurt. And it was just, you know - I believe I heard a sliding too. I believe I heard the vinyl sliding off where I believe it was leaned against.

Depo. of Mike Pangburn, at p. 7-8. The roll of linoleum was 12 feet long and might have weighed as much as 100 pounds. Id. at p. 8.

Home Depot does not have any signs instructing customers on how to transport heavy objects or items. Id. at p, 12-13. Nor does Home Depot have any safety videos or manuals to educate its employees on how to assist or instruct customers on how to safely handle items within the store. Id. at 13.

The linoleum that fell on plaintiff had apparently been leaned against a rack by two Home Depot customers. William Tezza testified that two customers came to the scene after the accident, apologized, picked up the linoleum and left. Tezza Depo. at p. 33-35. Mr. Tezza further testified that he had walked past the area where the accident occurred fifteen to twenty minutes before the accident and that he did

not see the linoleum. Id. at p.22. Ron Howard, the Home Depot Loss Prevention Supervisor, passed the area no more than 10-15 minutes before the accident and the linoleum was not there at that time. Howard Dep. at 40. Mike Pangburn and a District Manager were both doing inventory on the same aisle that plaintiff was injured. Tezza Dep. at 17, 19, and 23-24.

Mr. Pangburn testified that it is the practice of Home Depot to allow customers to carry their own linoleum without the use of carts and that an employee does the "rolling off of the vinyl." Pangburn Dep. at p. 12. Tezza testified that an employee of Home Depot told him that he had cut a piece of linoleum for a customer, and that only an employee could cut linoleum for a customer. Tezza at p. 32. Further, there are no warning or instruction signs for customers regarding the loading and carrying of items in Home Depot. Id. at p. 42.

Summary Judgment Standard

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), Fed.R.Civ.P; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548 (1986). On a summary judgment motion, the court "cannot try issues of fact; it can only determine whether there are issued to be tried." Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F.Supp. 1027, 1034 (D.S.C. 1993).

The party seeking summary judgment shoulders the initial burden of demonstrating that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. Id. A fact is deemed "material" if proof of its

existence or nonexistence would affect the disposition of the case under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). An issue of material fact is "genuine" if the evidence so offered is such that a reasonable jury might return a verdict for non-movant. Id. at 257, 106 S.Ct. At 2515. In determining whether a genuine issue has been raised, the court must construe all inferences against the movant and in favor of the non-movant. Id. Once the moving party has demonstrated the absence of any genuine issue of material fact, the non-moving party must produce specific facts showing that there is a genuine issue for trial, rather than resting upon the bald assertions of his pleadings. Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4~ Cir. 1985}, abrogated on other grounds, Price Waterhouse v. Hopkins, 104 L.Ed.2d 268 (1989).

Discussion

Although plaintiff argues otherwise, this case must be analyzed under the legal framework of the classic foreign substance slip and fall case. Here, the foreign substance, the falling linoleum, caused of plaintiff's injuries.

It is well settled South Carolina law that a merchant is not an insurer of the safety of his customers but owes them only the duty of exercising ordinary care to keep the premises in a reasonably safe condition. Pennington v. Zayre Corp., 165 S.E.2d 695, 696 {1969). This includes the duty to keep the aisle and passageways in a reasonably safe condition. In cases such as this, the negligence of the merchant may be proved by showing that the material causing the accident was placed in the area through the agency of the store or that the merchant had actual or constructive notice of its presence in the area and failed to remove it. Id.

The merchant's constructive knowledge of the dangerous condition can be established by showing that the foreign substance had been in the area for a sufficient time and that the merchant would have discovered and removed it had the merchant used ordinary care. Wimberly v. Winn-Dixie Greenville. Inc., 165 S.E.2d 627, 629 (1969); (Gillespie v. Wall-Mart Stores, Inc., 394 S.E.2d 24 (Ct. App. 1990). The mere fact that the linoleum was leaning against the store shelf and that store employees were working in the general area is insufficient, standing alone, to charge a merchant with negligence. Gilbert, 394 S.E.2d at 25 and cases cited therein); Calvert v. House Beautiful Paint & Decorating Center. Inc., 443 S.E.2d 398, 399 (S.C. 1994).

Here, Home Depot did not create the condition that caused plaintiff's injuries. The only testimony on the issue shows that the linoleum was placed there by fellow shoppers. Ms. Hurst, therefore, is required to establish that Home Depot had actual or constructive knowledge of the presence of the linoleum in the aisle and failed to remove it. Ms. Hurst has failed to present any evidence to carry this burden.

There has been no evidence presented establishing that Home Depot employees knew that the linoleum was propped up against the store shelf. Thus, Ms. Hurst must prove constructive knowledge on behalf of Home Depot by showing that the linoleum was in the area for such a long period of time that Home Depot should have been aware of it and removed it. Two witnesses provided testimony on this issue: Mr. Tezza testified that the linoleum was not in the area 15-20 minutes prior to the accident, and Ron Howard testified that he had been in the area 10-15 minutes before the accident and the linoleum was not there. Thus, the linoleum could not have been in the aisle for longer than 10-15 minutes, but it is just as likely that the linoleum had only been in the aisle a few moments prior to the accident.

Based on the undisputed evidence, it is apparent that any determination of how long the linoleum had been in the aisle would be pure speculation. As a matter of law, Ms. Hurst's evidence is insufficient to establish constructive notice. See Wimberly, 165 S.E.2d at 629 (concluding that the trial court should have directed a verdict in favor of defendant because no evidence was pointed out which reasonably tended to prove that the rice was on the floor at any particular time prior to the actual fall, and thus, the jury should not be permitted to speculate that it was on the floor for such a length of time as to find defendant was negligent in failing to detect and remove it), Pennington, 165 S.E.2d at 696 (affirming grant of involuntary non suit in case where plaintiff slipped on plastic bags on the floor: "The plastic bags were obviously on the floor at the time of the fall. There is no evidence in the record that the bags were on the floor at any time prior thereto. To hold that the bags had been there sufficiently long that they should have been discovered by the merchant would be pure speculation.").

Ms. Hurst contends the size of the linoleum, coupled with the lack of supervision, assistance and/or instruction from Home Depot created an ongoing hazard, and thus, she is not required to prove actual or constructive notice. In essence, Ms. Hurst contends a foreseeable risk of harm was created, and Home Depot should be held liable for failing to exercise due care in reducing or eliminating this risk and in failing to warn against it. This argument has very recently been rejected by the South Carolina Court of Appeals in Wintersteen v. Food Lion, Inc., 518 S.E.2d 828 (Ct. App. 1999), a case very similar to this one.

In Wintersteen, the invitee brought a premises liability suit against the grocery store to recover for injuries she suffered when she slipped and fell on a puddle of clear liquid near a self-serve soda fountain equipped with an ice dispenser. There was no evidence that a Food Lion employee

put ice or water on the floor, and thus plaintiff had to establish actual or constructive knowledge. Further, there was only speculative evidence as to how long the ice had been on the floor, and this was insufficient to establish constructive notice.

Wintersteen, however, argued the store created a permanent and ongoing hazard by installing the self-serve drink and ice machine, creating a foreseeable risk of harm. Under this analysis, Wintersteen argued she did not have to prove actual or constructive knowledge because her case was not a "foreign substance" case. Rather, Wintersteen asserted that Food Lion was liable for failing to reduce or eliminate this risk. The Wintersteen court rejected this argument, stating:

> [A] storekeeper cannot be held liable for injuries caused by a foreign substance absent proof of the storekeeper's actual or constructive knowledge of the presence of the foreign substance, even if the storekeeper's own actions increased the likelihood that a foreign substance would fall on the floor.

518 S.E.2d at 831 (relying on Simmons v. Winn-Dixie Greenville, Inc., 457 S.E.2d 608 (1995) and Bessinger v. Bi-LO, Inc., 496 S.E.2d 33 (Ct. App. 1998).

In this case, as in Wintersteen, Home Depot's actions in allowing customers to carry out their linoleum purchases may well have increased the likelihood of an accident. Nevertheless, Ms. Hurst failed to present any evidence of an essential element of her case under South Carolina law: that Home Depot had actual or constructive notice of the presence of the linoleum. Thus, this court is required to grant summary judgment in Home Depot's favor.

Therefore, it is hereby **ORDERED** that Home Depot's motion for summary judgment is granted and this action is dismissed.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 00-1899
CA-99-1334-2-11

GRETHA M. HURST

Plaintiff – Appellant

v.

HOME DEPOT U.S.A., INCORPORATED, a/k/a Home Depot

Defendant – Appellee

Entered: February 21, 2001

ORDER

Appellant has filed a petition or rehearing and a motion for enlargement of time.

The Court denies the petition for rehearing and the motion for enlargement of time.